Nos. 11775 and 11776

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 11775.

LAURA GAWECKI and COLLETTE MITRE, doing business under the fictitious name of SKYLARK CAFE & RESTAURANT,

Appellants,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,

Appellee.

No. 11776.

LAURA GAWECKI and COLLETTE MITRE, doing business under the fictitious name of SKYLARK CAFE & RESTAURANT,

Appellants,

vs.

DUBUQUE FIRE AND MARINE INSURANCE COMPANY OF DUBUQUE, IOWA, a corporation,

Appellee.

Brief of Appellees, General Insurance Company of America and Dubuque Fire and Marine Insurance Company of Dubuque, Iowa.

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Brief of Appellees, General Insurance Company of America and Dubuque Fire and Marine Insurance Company of Dubuque, Iowa.

Appellees' Statement of the Case.

Appellants, as plaintiffs, brought two separate actions, one against appellee, General Insurance Company of America, and one against appellee, Dubuque Fire & Marine Insurance Company of Dubuque, Iowa. These causes were consolidated for trial and appeal, and since appellants

have consolidated their brief, appellees are joining in answer to appellants' brief.

Appellants brought action against each appellee under separate complaints, but since, except for minor variations which will hereafter be noted, the insurance contracts were substantially the same, and the issues raised practically identical, and there was no substantial difference in the Findings of Fact made by the Court in each case, appellees believe that one statement of appellees' position will cover argument on both appeals.

Appellants brought the separate causes of action by complaints against the separate appellees to enforce the terms of two separate policies of insurance executed and delivered severally by the appellees. Each and both of the contracts of insurance were in the statutory form provided by the laws of the State of California. [Insurance Code, Secs. 2070-2071; General Tr. 3, Dubuque Tr. 3; Pltf. Exs. 1-2.]

The General Insurance Company policy insured appellant, Laura Gawecki, doing business as the Skylark Cafe, from June 28, 1945, to June 28, 1948, against loss by fire to the furniture and fixtures situate at 7519 Sunset Boulevard, Los Angeles, California; and the Dubuque Fire & Marine Insurance Company policy insured Laura Gawecki and Collette Mitre, doing business as Skylark Cafe, from July 9, 1945, to July 9, 1948, against loss by fire to the same property.

The General Insurance Company policy was executed by Thomas V. Humphreys, General Agent of said com-

pany; and the Dubuque Fire & Marine Insurance Company policy was executed by S. Fine, Agent for said company. [Pltf. Exs. 1-2.]

Each and both of said policies contained the provisions made mandatory by the above-cited statutory provisions (Insurance Code, Secs. 2070-2071), as follows:

> "Chattel mortgage. Unless otherwise provided by agreement in writing endorsed hereon or added hereto this company shall not be liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage, but the liability of the company upon other property hereby insured shall not be affected by such chattel mortgage. * * *
>
> "Unless otherwise provided by agreement endorsed hereon or added hereto this entire policy shall be void, * * * if the interest of the insured be other than unconditional and sole ownership, * * *.
>
> "This policy is made and accepted subject to the foregoing stipulations and conditions and those hereinafter stated, which are hereby specially referred to, and made part of this policy, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provisions or condition of this policy except by writing endorsed hereon or added hereto, and no person, unless duly authorized in writing, shall be deemed the agent of this company." [Pltf. Exs. 1-2.]

They also complied with the statute (Sec. 2072, Insurance Code), as follows:

> "There shall be printed on the outside of the policy, in type not smaller than small pica, the following words in this form:
>
> "READ THIS POLICY.
>
> "* * * POLICY IS SUSPENDED, unless otherwise agreed in writing, if * * *
>
> "9th. Property is or becomes encumbered by chattel mortgage; * * *." [Pltf. Exs. 1-2.]

There were no agreements, either in writing or otherwise, endorsed upon the policy or added thereto, waiving or changing these provisions, and no agreements, either oral or in writing, for any other or different contracts than the written contracts of insurance. [General Tr. 26, f. 6, 28; Dubuque Tr. 27, f. 34.]

A fire occurred on the 12th day of January, 1946, damaging the property described in the two contracts of insurance. (No issue is made upon the amount of loss or damage, and it will not be further noted.)

At the time of the fire, all of the property damaged was encumbered by chattel mortgages. [General Tr. 26, f. 28; Dubuque Tr. 26, f. 33.]

These chattel mortgages were executed July 7, 1945, and recorded August 22, 1945. [General Tr. 64, f. 29.]

Neither of the appellees, nor any of their officers or agents, had any notice or knowledge of these chattel mortgages until after the fire. [General Tr. 26, f. 29; Dubuque Tr. 23, f. 31.]

Appellees' Argument.

Appellants, in their brief, adopt a novel approach to an appeal from the rulings of a trial court in a case at law. They make no specific assignments of error other than that the Court erred in denying appellants' motion for new trial and motions to amend Findings and Conclusions and to direct entry of new Judgment; and the general statement that the evidence was insufficient to sustain the Findings of Fact, Conclusions of Law, and Judgment. (App. Br. p. 5.)

Nowhere do appellants specify or point out wherein the trial court's Findings or any special portion thereof are not sustained by the evidence. They cannot do so, as each and every Finding was supported by either documentary evidence, admissions in the pleadings or in the course of trial, or by uncontradicted testimony. Since, therefore, appellants cannot, and have not, tried to point out any insufficiency of evidence to support the Findings, or any of them, appellees feel that they are neither called upon nor would this Court desire, an elaborate review of the evidence to demonstrate wherein each Finding is sustained by the evidence, and will accordingly present their argument from the standpoint of demonstrating that the Findings unquestionably support the Conclusions of Law and Judgment.

Reduced to the simplest terms, these appeals present nothing but the following proposition:

Appellee, General Insurance Company of America, executed and delivered to appellant, Laura Gawecki, doing business as Skylark Cafe, and appellee, Dubuque Fire and Marine Insurance Company, executed and delivered to Laura Gawecki and Collette Mitre, doing business as

Skylark Cafe, their separate policies of insurance insuring the parties named against loss by fire to certain personal property. Each and both of the policies were in the form made mandatory by the statutes.

The property described was damaged by fire on the 12th day of January, 1946, and at the time of the fire all of the property damaged was encumbered by chattel mortgages. (Appellants make some contention that one of the chattel mortgages, although in form and substance a chattel mortgage, was not a real chattel mortgage, but since appellants concede that the other mortgage was a valid chattel mortgage (Pltf. Br. p. 9), we believe no further attention need be paid to this contention.)

Neither of the appellees, nor their agents, had any notice or knowledge of these chattel mortgages until long after the fire, and neither of the appellees, either orally or in writing, or by any acts constituting waiver or estoppel, waived, modified, or in any manner changed the written contracts of insurance sued upon.

It should follow without saying that if the terms of written contracts, plain and unambiguous and not against public policy, are to be enforced when suit is brought upon the contracts, then the clear statutory provisions of the contracts in question providing that the "company shall not be liable for loss or damage to property insured hereunder while encumbered by chattel mortgage," must be given effect, and the trial court did not err in doing so.

That the provision is not against public policy, of course, is manifest by the fact that it is a mandatory statutory provision and insurance companies are prohibited from executing and delivering a policy that does not contain this provision (Insurance Code, Secs. 2070-2071),

and the parties to an insurance contract in this state must be deemed to have entered into the contract with reference to the statutory form.

Kavanaugh v. Franklin Fire Ins. Co., 185 Cal. 307;

Harlow v. American Equitable Assur. Co., 87 Cal. App. 28;

Kurihara v. Detroit Fire Ins. Co., 79 Cal. App. 257.

The clause is clear and unambiguous and the insurance is suspended while the property is encumbered by a chattel mortgage. The last case on the subject in the California state courts was *Hargett v. Gulf Ins. Co.,* 12 Cal. App. (2d) 449, 55 P. (2d) 1258.

See also the opinions by Judge Knox, sitting in District Court, Southern District of California:

Cinema Schools v. Westchester Fire Ins. Co., 1 Fed Supp. 37;

Cinema Schools v. Federal Union Ins. Co., 1 Fed. Supp. 42.

These three cases were all tried and decided after the adoption of the California Standard Policy containing the chattel mortgage clause under discussion.

See also, United States Supreme Court decision applying the chattel mortgage provision contained in the New York standard form:

Home Ins. Co. v. Scott, 284 U. S. 177, 76 L. Ed. 230.

For applying analogous clauses in the policy, see the recent decision in this Court opinion by Circuit Judge Denman, holding there could be no recovery under the policy while the property was occupied for purposes other than stipulated in the contract:

National Reserve Ins. Co. v. Ord, et al., 123 F. (2d) 73.

See also the following cases cited therein:

Arnold v. American Ins. Co., 148 Cal. 660;

Allen v. Home Ins. Co., 133 Cal. 29.

See also opinion of the late Judge Jenney, Southern District of California, holding that the provision insuring personal property only while located at a particular place prevented recovery when the property was at another location:

Alexander v. General Ins. Co. of America, 22 Fed. Supp. 157.

See also:

Conner v. Union Automobile Ins. Co., 122 Cal. App. 105,

which holds that the insurance was suspended while an automobile was being used to draw a trailer contrary to the stipulations of the contract.

Answer to Appellants' Argument and Cases.

Appellants in their argument present several false premises, none of which are sustained by the issues and facts or sound in law. Appellees are therefore obliged to burden this Court with answers to propositions raised that are neither within the issues nor sound in law.

The first contention raised by appellants is that the existence of a chattel mortgage on the property does not void the policy under the chattel mortgage clause where there was no inquiry made. And from this false premise and by the use of sundry isolated bits of dicta and the citations from cases treating on entirely unrelated matters, appellants endeavor to demonstrate that the standard chattel mortgage clause does not mean what it says—that "this company *shall not* be liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage," but means, on the contrary, that "this company *shall* be liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage."

The trial court did not find or hold, and there was never any contention made that the chattel mortgages voided the policies. The contracts and the statutory provisions do not so provide, but provide that the company shall not be liable for loss to any of the property while encumbered by chattel mortgage, but the "liability of the company upon other property insured shall not be affected by such chattel mortgage."

This provision is a specification of the property insured and must be treated the same as the similar provisions in

the contract, such as the provision providing the policy insured only while the property was occupied for dwelling house purposes.

Allen v. Home Ins. Co. and
Arnold v. American Ins. Co., cited *supra.*

Or the provision that the property was insured only while occupied for a certain purpose, as shown by the case of *National Reserve Ins. Co. v. Ord, et al.,* cited *supra.*

Or that the property was insured only while at a certain location, as demonstrated in the leading case of *Steil v. Sun Insurance Office*, 171 Cal. 795, 155 Pac. 72.

These cases, in addition to the cases heretofore cited relating to the chattel mortgage clause, all point out that such conditions are not warranties or conditions providing for the voidance of the contract in case of their breach, but are provisions going to the basis of the contract and specifying the property against loss of which the policies insure, and, consequently, for a court to disregard them would be for the court to enforce a contract that was not made.

The case of *Hargett v. Gulf Ins. Co.*, 12 Cal. App. (2d) 449, 55 P. (2d) 1258, is the last and only case interpreting the chattel mortgage provision decided in the California courts since the adoption of the standard policy containing the chattel mortgage clause under discussion. This case answers every contention raised by appellants. It is the latest decision and expression of a California court on the interpretation of the chattel mortgage provision, in fact, the only case in California where the interpretation and application of the chattel mortgage provision has been directly involved since the adoption of the standard policy.

In that case, one E. H. Rose was an agent for the defendant companies. The assured notified Rose that he had given a chattel mortgage on the property insured and would take the policies to the mortgagee bank. Nothing further was said about the policies. No request was made by the assured that any endorsement should be made thereon and Rose said nothing whatever on the subject. Rose did not report the matter to any of the companies or to any of the representatives thereof. Within two or three days after the conversation with Rose, plaintiff took the policies to the bank where they remained until after the fire, which occurred about a month later. The trial court found that the companies had waived the chattel mortgage provision of the policy, but the Appellate Court, in reversing the case, found to the contrary upon this evidence, and after deciding that Rose as a local agent was without power to consent to the chattel mortgage and thereby continue the insurance in force notwithstanding the mortgage, said:

> "(3) Even though it had been established that Rose was a general agent, the evidence would still be insufficient to show that the companies waived compliance with the conditions of the policies. By the terms of the policies no officer or agent had authority to waive any provision or condition of the policies except by writing endorsed thereon or attached thereto. These provisions may not be ignored. They are valid and must be given effect the same as any other provisions. (*Fidelity & Casualty Co. v. Fresno Flume etc. Co.,* 161 Cal. 466 [119 Pac. 646, 37 L. R. A. (N. S.) 322]; *Westerfeld v. New York Life Ins. Co.,* 129 Cal. 68 [58 Pac. 92, 61 Pac. 667]; *Iverson v. Metropolitan Life Co.,* 151 Cal. 746 [91 Pac. 609, 13 L. R. A. (N. S.) 866]; *Madsen v.*

Maryland Casualty Co., supra.) (4) The rule relied upon by plaintiff and supported by the great weight of authority is, that after a breach has occurred which would avoid or forfeit a policy, unless consented to by the company and a proper officer has knowledge thereof and with such knowledge the company leads the assured to rely upon his policy as a valid policy, it will not be heard to allege such breach against a claim for subsequent loss occurring at a time when, from the conduct of the company, the assured had every right to believe that his property was protected by the policy. (*Arnold v. American Ins. Co.*, 148 Cal. 660 [84 Pac. 182, 25 L. R. A. (N. S.) 6]; *West Coast Lumber Co. v. State Inv. & Ins. Co.*, 98 Cal. 502 [33 Pac. 258]; *Murray v. Home Benefit Life Assn.*, 90 Cal. 402 [27 Pac. 309, 25 Am. St. Rep. 133]; *Fishbeck v. Phenix Ins. Co.*, 54 Cal. 422; *Farrar v. Policy Holders Life Ins. Assn.*, 3 Cal. App. (2d) 87 [39 Pac. 2d 229].) The principle of these cases is that the breach terminates the liability of the insurance company and creates an obligation to return to the insured the unearned portion of the premium which the company has not the right to retain, thus imposing upon the company having knowledge of the breach a positive duty to elect between cancellation of the policy and waiver of the breach. If the company remains silent and fails to cancel or rescind the policy and the assured is actually misled thereby into believing that his policy is valid and in force the company is estopped to rely upon the breach. The rule would be applicable here if the breach had been one which avoided or forfeited the policies. Such, however, is not the case.

"(5) Upon the giving of the chattel mortgage the policies did not become void nor were they forfeited. There was a mere suspension of insurance coverage

as to such of the insured property as was encumbered by the chattel mortgage and while it was so encumbered. This suspension was temporary and the coverage would have been restored upon satisfaction of the debt or release of the property from the lien and it would have been restored as to any portion of the property that might have been released from the lien. The policy itself remained in force. There was no obligation on the part of the companies to return any of the premiums; in fact, the policies provided that suspension of insurance would not entitle the assured to the return of any part of the premiums, nor were the companies under the duty of giving notice to the assured that the insurance had been suspended. He must be presumed to have known that. The circumstances were not such as to call upon the companies or any agent of the companies to take any action whatever of their own, nor were they under the duty to suggest to plaintiff any action which he should take in the premises. The essential elements of estoppel are entirely wanting. In remaining silent and retaining the premiums paid, the companies did not fail in any duty they owed the assured under the contracts or otherwise.

"The facts of this case bring it directly within the holding of the Supreme Court in *Steil v. Sun Ins. Office,* 171 Cal. 795 [155 Pac. 72]. In that case goods were insured while contained in the Chronicle Building and not elsewhere. Some of them were removed to another building, thus suspending the insurance as to the removed portion, without annulling the policy. It was said as to this situation: 'There being no condition or covenant against removal, the result would be that while such removal would, for the time being, terminate the risk incurred by the company, it would not avoid the policy. If the goods were subsequently returned, the company would be

liable, as before, for a loss occurring to them while in the building. In order to continue the insurance upon the goods, or, in other words, to carry it to the goods in the new location, something more was required than a mere notification by the assured to the insurer of the fact that the goods were, or were about to be, removed. That fact alone would only suspend the insurance risk. The insurer must be informed, or be given good cause to believe, that the party insured desired to have the insurance on the goods continued in the new place, that he wished a modification of the policy to make it cover the goods in the new location, and must then, by positive act, or by failure to act, cause the insured to believe that the insurer consented to such transfer or modification, and that the goods were covered by the policy. Something in the nature of a new agreement, either express, or implied from conduct or words, or created by estoppel, was necessary.'

"No distinction may be drawn between temporary suspension of insurance by reason of the removal of the assured goods, and a temporary suspension by reason of the encumbrance of the property by chattel mortgage. In neither case is the policy terminated or avoided. If the plaintiff had desired to have the insurance continue, notwithstanding the chattel mortgage, it was his duty to notify the companies of the mortgage, to request the endorsements of his policies, and to exact some assurance that endorsements would be made or that the insurance would be continued in force without them. The evidence fails to show that plaintiffs met any of these requirements."

The Court in the *Hargett* case quoted rather extensively from the case of *Steil v. Sun Ins. Office*, 171 Cal. 795. In that case the assured claimed to have notified the com-

panies of the removal of the goods from the location where they were insured and that none of the companies had objected to the removal or had given notice that the goods were not covered in the new place.

The Court in the *Steil* case, in addition to the language which is quoted in the *Hargett* case, said:

> "As above stated, there is no provision in the policy that the removal of the goods should operate to annul it. The provision in the insurance clause that the goods were insured while contained in the Chronicle building, and not elsewhere, coupled with the qualified description, operated to relieve the company of further obligation upon the removal of the goods from said building with respect to the goods so removed. The qualification was a part of the description of the things insured. They were not merely *the goods*, but were the goods while contained in the Chronicle building. A loss of the goods by fire while they were out of the building would not be a loss covered by the policy, and the insured would not be liable therefor. (*Mawhinney v. Southern Ins. Co.*, 98 Cal. 184 [20 L. R. A. 87, 32 Pac. 945]; *Benicia A. Works v. Germania Ins. Co.*, 97 Cal. 468 [32 Pac. 512]; *Slinkard v. Manchester etc. Co.*, 122 Cal. 595 [55 Pac. 417].) This language of the insurance clause did not constitute a warranty, either express or implied, by Steil, that he would not remove the goods. The company had no occasion to demand of Steil a warranty against removal. Such removal would not increase its obligation but would relieve it therefrom. The insurance clause completely protected it against a loss occurring to the goods in any other place. The language does not imply a warranty. Its effect is merely that the goods were insured only while kept in the building designated."

As previously stated, the *Hargett* case is the only California case decided involving the chattel mortgage provision of the policy since the adoption of the standard form of fire insurance policy. The only other cases in this jurisdiction are the two cases decided by Judge Knox sitting in the Southern District of California:

Cinema Schools v. Westchester Fire Ins. Co., 1 Fed. Supp. 37, and

Cinema Schools v. Federal Union Ins. Co., 1 Fed. Supp. 42.

In the first case cited, the Court, speaking of the chattel mortgage provision, said:

> "(7) Provisions of a fire insurance policy such as that now before me are valid and enforceable, and may constitute a complete defense against liability on the part of the insurer. *Sun Insurance Office v. Scott,* 284 U. S. 177, 52 S. Ct. 72, 76 L. Ed. 229; *Hunt v. Springfield F. & M. Ins. Co.,* 196 U. S. 47, 25 S. Ct. 179, 49 L. Ed. 381. Indeed, a chattel mortgage, valid as between the parties thereto, although fraudulent and void as to creditors, is an incumbrance which may raise a good defense to an action brought on a fire insurance policy such as the instant suit. *Hartford Fire Ins. Co. v. Jones,* 31 Ariz. 8, 250 P. 248; *Home Ins. Co. v. Scott* (C. C. A.), 46 F. (2d) 10."

Appellants (App. Br. p. 29) make the bald statement that the cases cited by the District Court may be distinguished on the ground that in those cases the insured did something after the policy had been issued which changed the risk which the assured had accepted. Appellants point out no reason why such a gratuitous statement should be sustained or cite any cases in support thereof.

Moreover, appellants again ignore the record and, of course, the reasoning given in all the cases heretofore cited.

As to the record, it shows conclusively that there were no facts or circumstances that would give rise to any possible waiver of the conditions of the contract or sustain an estoppel to rely thereon, and the Court so found.

To briefly recapitulate the facts relating thereto, we find first that the chattel mortgages were, in the case of the General policy, executed after, and not before, the policy was applied for and became effective. And as to the Dubuque, the negotiations for the insurance were prior to the execution of the chattel mortgages. The insurance transactions were handled for the appellants by one Mrs. O'Rourke, who was not an agent for either of the companies but was representing the appellants. Her relations with the insurance commenced sometime in May of 1945. [Tr. 58, f. 22.] Neither Mrs. O'Rourke nor the appellants had any direct negotiations with either of the appellees. [General Tr. 59, f. 23; Dubuque Tr. 14, f. 15-16.]

As to the General policy, they had no negotiations with the General at any time and neither Mrs. O'Rourke nor appellants ever talked with anybody from the General. Mrs. O'Rourke made application for this insurance to the Republic Insurance Company. For some reason that does not appear, the Republic Insurance Company did not enter into the contract, but procured the General Insurance Company policy through Thomas V. Humphreys & Co., General Agents for said company. [General Tr. 59, f. 23; Pltf. Ex. 1.]

The risk was bound some time in May of 1945. [General Tr. 59, f. 23.] The policy was delivered to Mrs.

O'Rourke by the representative of the Republic Insurance Company and insured appellants from the 28th day of June, 1945, to the 28th day of June, 1948. [General Tr. 60, f. 24.] The appellants did not even know that insurance was being procured in the General, and, in fact, had they known it was to be in the General, they would not have taken it. [General Tr. 60, f. 24.] However, appellants did accept the policy as tendered by the General and retained it and still retain it.

As to the Dubuque policy, practically the same situation exists. Appellants had no direct relationships with any officer or agent of the Dubuque authorized to consummate insurance contracts. Their only relationship was with one Pransky, who had verbal authority to solicit insurance and to place orders for acceptance or rejection. He had no authority to bind risks or countersign policies. [Dubuque Tr. 15, f. 15.] The Dubuque transactions were had at the same time as the General transactions, as above outlined, and eventuated in the submission to appellants of the Dubuque policy insuring from the 9th day of July, 1945, to the 9th day of July, 1948. [Pltf. Ex. 2.] This policy was also delivered to appellants and accepted in its present form and retained.

The situation, as disclosed by the evidence, is simply that each of these companies had submitted to appellants their separate policies of insurance, all the terms of which were embraced in the written instruments, and appellants accepted these policies with full knowledge of their statutory provisions, and are here seeking to enforce the terms of the contract, but refuse to be bound by the very terms of the policies they are suing upon.

Since, as demonstrated by the cases previously cited and quoted from, this case does not involve a question of war-

ranty, the breach of which would void the policy, which might be the subject of waiver or estoppel if the evidence warranted, but a case in which the appellants are seeking to recover for the loss of property not insured and to create a liability not stipulated for in the contract, which certainly could not be created by estoppel (*McCoy v. Relief Assn.,* 66 N. W. 699), particularly where there is not an iota of testimony to warrant it. Appellees fear that they are unduly burdening this brief by further citations and argument, but since the "straw man" is there, appellees have no alternative but to pray the Court's indulgence while they proceed further to knock it down.

That it is immaterial whether the property became encumbered by chattel mortgage before or after the policies became effective is amply demonstrated by the opinion of Judge Knox in the case of *Cinema Schools v. Federal Union Ins. Co.,* 1 Fed. Supp. 42, a companion case of *Cinema Schools v. Westchester Fire Ins. Co.,* heretofore cited, wherein Judge Knox disposes of this contention in the following language:

> "This is a companion case to Cinema Schools, Inc., v. Westchester Fire Ins. Co. (D. C.), 1 F. Supp. 37. The facts involved in the two suits are identical, except that here the chattel mortgage discussed in the Westchester Fire Insurance Company opinion was in existence at the time the present defendant issued its policy of insurance. As a result, plaintiffs take the position that since no inquiry was made by defendant prior to the issuance of its policy, the stipulation against chattel mortgages was thereby waived. An examination of the adjudicated cases discloses this contention to be without substantial foundation. In Boston Ins. Co. v. Hudson (C. C. A.), 11 F. (2d) 961, action was brought on a California standard

form fire insurance policy, containing a provision, as in the case at bar, that the policy should be void, if the interest of the insured were other than unconditional and sole ownership. The insurer or its agent had notice, before loss, of breach of this condition. Nevertheless, the court held that there was no waiver of the breach because the policy provided that no representative of the insurer had power to waive any provision of the policy except by written indorsement. Similarly, in the case of Fidelity Union Fire Ins. Co. v. Kelleher (C. C. A.), 13 F. (2d) 745, the same court held it to be immaterial that the insurer's local agent had notice before delivery of the policy that the insured did not own the insured property in fee, since there could be a waiver only by a writing endorsed on the policy. And in Northwestern Nat. Ins. Co. v. McFarlane (C. C. A.), 50 F. (2d) 539, it was again reiterated that where a policy provides that no agent can waive any of the terms of the policy except by written endorsement, the knowledge of the agent does not waive breach of a condition in the policy. See, also, to the same effect, Home Ins. Co. v. Scott, 284 U. S. 177, 52 S. Ct. 72, 76 L. Ed. 229.

"Since in the case at bar the most that an inquiry could have done would have been to give the insurance company or its agent knowledge of the existence of the chattel mortgage, the foregoing decisions are authority for holding that the failure to inquire does not constitute a waiver of the violation of the provisions of the policy. It follows that the decision here will be the same as in the suit brought against the Westchester Fire Ins. Co."

The rule laid down by Judge Knox in the foregoing quotation, to-wit, that it is competent for parties to stipulate in their contracts that the terms thereof may not be

changed or waived, except in the manner provided for therein, to-wit, by agreement in writing endorsed thereon or added thereto, and that such stipulations must be given full force and effect, is the rule in this jurisdiction and in the state courts of California. This has been the rule in the United States Supreme Court since, and even before, the decision in the case of *Northern Assur. Co. v. Grandview Building Assn.*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213.

It has been cited and followed down to the latest case on the point:

Home Ins. Co. v. Scott, 284 U. S. 177, 76 L. Ed. 230.

See also:

Penman v. St. Paul F. & M. Ins. Co., 216 U. S. 311, 54 L. Ed. 493.

It is also the rule in this circuit.

See:

Boston Ins. Co. v. Hudson, 11 F. (2d) 961 (9th Cir.);

Northwestern Nat. Ins. Co. v. McFarland, 50 F. (2d) 539 (9th Cir.);

Fidelity Union Fire Ins. Co. v. Kelleher, 13 F. (2d) 745 (9th Cir.).

It is also the rule in the other Federal circuits.

Hartford Fire Ins. Co. v. Nance, 12 F. (2d) 575;

Fischer v. London & L. Fire Ins. Co., 83 Fed. 807;

Scottish Union v. Encampment Smelting Co., 166 Fed. 231;

Mulrooney v. Royal Ins. Co., 163 Fed. 833;

Mo. Pacific Railway Co. v. Western Assur., 129 Fed. 610;

Maryland Cas. Co. v. Eddy, 239 Fed. 477.

It is also the rule in the appellate and Supreme Courts of the State of California.

See:

Fidelity Co. v. Fresno Flume Co., 161 Cal. 466, where the Court quotes and follows the *Northern Assur. v. Grand View Building Assn.* case.

See:

Hargett v. Gulf Ins. Co., supra;

Wilson v. Maryland Cas. Co., 19 Cal. App. (2d) 463, 65 P. (2d) 903, citing and following *Lumbermen's Undrs. v. Rife, supra,* and *Hargett v. Gulf Ins. Co.*

See also:

Shuggart v. Lycoming Fire Ins. Co., 55 Cal. 408;

Enos v. Sun Ins. Co., 67 Cal. 621;

Farnum v. Phoenix Ins. Co., 83 Cal. 246;

Slade Lbr. Co. v. National Surety Co., 128 Cal. App. 420, 17 P. (2d) 775;

Iverson v. Met. Life Ins. Co., 151 Cal. 746;

Valentine v. Head Camp, P. J., W. O. W., 180 Cal. 192.

Appellants argue one other proposition under the heading "Insurance Contracts Should Be Construed to Protect the Interests of the Assured Wherever Possible." (App. Br. p. 25.)

Just what appellants mean by this they do not say in their argument, but if they are attempting to demonstrate the familiar rule that ambiguous provisions of a contract are to be construed most strongly against the parties proposing the contract, and that this applies to insurance contracts as well as others, we can go along with them on the proposition of law, even though it has been doubted that this rule applies where a statutory form of contract is to be interpreted.

However, in this case there has been not the slightest suggestion that there is any ambiguity or need for interpretation of the clause under discussion, and, indeed, there can be none in view of the multitude of cases such as those heretofore cited which have applied to this clause without ever a suggestion that there was any ambiguity in it.

But we think the rule of construction is as firmly established to require more than a mere statement of it:

> "But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, *and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense.*"
>
> *Imperial Fire Ins. Co. of London, England, v. County of Coos,* 151 U. S. 462, 38 L. Ed. 231.

Cases Cited by Appellants.

As previously stated, appellants have not cited, and, indeed, cannot cite, a single case contrary to the decision of the trial court in this case, but, on the contrary, have cited and quoted isolated bits of dicta from cases not in any way analogous to the present case, and have used and quoted certain expressions of courts used *arguendo* in deciding totally unrelated cases.

For example, the first case cited by appellants, *Raulet v. Northwestern Nat. Ins. Co.,* 157 Cal. 213, was decided prior to the adoption of the standard policy, and involves a clause entirely different from the clause under consideration here, a clause which was in the nature of a warranty, the breach of which voided the policy.

The *Raulet* case was considered by Judge Knox in the above-cited case of *Cinema Schools v. Westchester Fire Ins. Co.,* 1 Fed. Supp. 37, and the distinction between the two clauses pointed out.

Likewise, in the case of *Hargett v. Gulf Ins. Co.,* cited *supra,* the Court, noting this distinction, said:

> "The rule would be applicable here if the breach had been one which avoided or forfeited the policies. Such, however, is not the case."

Moreover, the real decision made in the *Raulet* case, as shown in the very quotation from the case on page 9 of Appellants' Brief, was that the Court decided that the document called a chattel mortgage was not such a chattel mortgage as was contemplated by the policy.

The next California case cited by appellants is the case of *Kavanaugh v. Franklin Fire Ins. Co.,* 185 Cal. 307 (App. Br. p. 19), from which appellants quote at some length.

The quotation from this case, found on pages 19 and 20 of Appellants' Brief, is a clear demonstration of the vice of quoting as authority argumentative language and dicta when the true decision was exactly to the contrary.

In this case the Court, holding that the plaintiff could not recover under the facts, reversed the trial court, and, in the paragraph immediately following the portions quoted by the appellants, announce through Judge Wilbur its decision in the following language:

> "This much is clear, at least, that both parties to the fire insurance policy must be deemed to have entered into a contract with reference to the statutory form. In other words, the statutory form is the commodity which is bought and sold in an insurance transaction. The policy in this case, as already stated, was void *ab initio.* It can only be given validity as against the insurance company by the applications of the principles of waiver and estoppel. It cannot be said that the insurance company waived this condition of the policy because the company knew nothing of the changed ownership of the premises. (*Bryant v. Granite Fire Ins. Co.,* 174 Mich. 102, 107 [140 N. W. 482]; *Dahrooge v. Sovereign Fire Assur. Co.,* 175 Mich. 248, 251 [141 N. W. 572].)"

The next California case cited by appellants, *Dunne v. Phoenix Ins. Co. of Hartford, Conn.,* 113 Cal. App. 256 (App. Br. p. 21), involved the question of the extent of the insurable interest of the assured in the property, and the Court, holding that the assured being a purchaser of personal property, although he had not fully paid the purchase price, had an insurable interest, and followed the general rule that where the assured has an insurable interest the policy will not be *void,* even though the interest was less than sole and unconditional.

This case did not involve, as does the present case, and the cases heretofore cited by appellees, the question of the basis of the contract of what property was covered by the policy, and the distinction is as shown in the foregoing quoted portions from the *Hargett* and similar cases.

Appellants' next case is *Kahn v. Commercial Union Fire Ins. Co.,* 16 Cal. App. (2d) 42, and is practically identical with the case of *Dunne v. Phoenix Ins. Co.* just referred to, and again in this case the Court held that the interest of the assured, although not sole and unconditional, was sufficient to satisfy the sole and unconditional ownership clause, and the fact that another had an interest in the property was not sufficient to void the policy. The questions raised in this case neither raised nor considered.

In the case of *Bass v. Farmers' Mutual Protective Fire Ins. Co.,* 21 Cal. App. (2d) 26 (App. Br. p. 21), the assured disclosed all of the material facts to the insurer's agent, and either through fraud or mistake of the agent,

the facts were not correctly recorded, with the effect that assured's interest was less than sole and unconditional, although the assured had a substantial insurable interest in the property. No question of the property covered was in any manner involved.

The case of *Sam Wong v. Stuyvesant Ins. Co.,* 100 Cal. App. 109 (App. Br. p. 23), was a case involving not a provision relating to the coverage of the policies but a provision which rendered the policy void if the interest of the assured be other than unconditional and sole ownership. The Court specifically found that the assured was the unconditional and sole owner, and, in consequence, the language used had reference to this decision.

The case of *Ames v. Employers' Cas. Co.,* 16 Cal. App. (2d) 255 (App. Br. p. 24), is not remotely in point, as there the Court found there was an actual waiver of the warranty, and that the misrepresentation was made not by the assured but by the company's agent.

Appellees do not feel called upon to burden this brief further by an analysis or criticisms of the few cases cited by appellants from outside jurisdictions (App. Br. p. 20), as the proposition under which these cases are cited is not in any manner germane to the issues here.

Trial Court Did Not Err in Denying Appellants' Motions for New Trial and to Amend Findings, Conclusions, and Judgment.

Although appellants assign as error (in fact, this is the only error assigned) that the trial court erred in denying the appellants' motions for new trial and in denying appellants' motions to amend Findings of Fact and Conclusions of Law, and to Direct Entry of New Judgment, they nowhere argue or present any authority to show wherein such error lies. Therefore, appellees will content themselves on this point with a statement of a single well-settled rule—that orders denying a new trial are not reviewable on appeal in the absence of a showing of a clear abuse of discretion, which has not been shown here.

U. S. v. Bransen, 114 F. (2d) 232 (9th Cir.).

Appellees respectfully submit that the trial court did not err in any of its rulings or in entering judgments for appellees, and that, therefore, the decision and judgment of the trial court should be sustained.

Respectfully submitted,

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